No. 91-1283

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In the Supreme Court of the United States

OCTOBER TERM, 1992

FRANK GREENBERG, INDEPENDENT EXECUTOR OF ESTATE OF JOHN W. MCGANN, DECEASED, PETITIONER

v.

H & H MUSIC COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an employer violated Section 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1140, which prohibits various forms of interference with employee rights created or protected by ERISA, by amending its health benefit plan to reduce coverage for AIDS-related illnesses after learning that an employee had AIDS.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATUTORY PROVISION INVOLVED

Section 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1140, provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C. 301 *et seq.*], or for the purpose

of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

STATEMENT

1. In December 1987, Jack McGann, an employee of respondent H & H Music Company, discovered that he had AIDS. He subsequently began to request reimbursement for AIDS-related medical expenses under H & H's group insurance plan which, at the time, provided up to $1 million in lifetime medical benefits for all employees. In March 1988, H & H officials discussed McGann's illness with him.

A few months later, H & H informed its employees that, effective August 1, 1988, it was becoming self-insured and was changing some of the plan's coverage and benefit provisions. Those changes included a reduction in the lifetime maximum payment for AIDS treatment from $1 million to $5,000. No similar limitation was placed on treatment for other diseases. Under the terms of the amended plan, McGann was unable to recover the substantial medical costs he incurred in the treatment of his illness. Pet. App. A2-A4, A35-A36; H & H Br. in Opp. App. 25a-26a.

2. In August 1989, McGann sued H & H, the plan's administrator, and its former insurer (collectively H & H) for violating Section 510 of ERISA.[1] Pet. App. A4.

[1] Respondent Brook Mays Music Co. was the administrator of H & H's plan while it was insured. Respondent General American

The complaint included claims for damages based upon the amount of McGann's uninsured medical expenses. H & H Br. in Opp. App. 8a-9a, 14a-15a.

a. Section 510 provides, in pertinent part, that an employer may not "discharge" or "discriminate against" a plan participant "for exercising any right to which he is entitled under the provisions of an employee benefit plan [or ERISA] * * * or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. 1140. McGann alleged that the reduction in the lifetime maximum coverage for AIDS treatment violated both the "retaliation" clause of Section 510 (discrimination "for exercising any right") and the "interference" clause (discrimination "for the purpose of interfering with the attainment of any right"). H & H Br. in Opp. App. 8a.

b. Respondents filed a motion for summary judgment supported by an evidentiary submission detailing the circumstances surrounding the August 1, 1988, plan amendments. Respondents' submission indicated that the terms of the plan permitted H & H to alter its coverage obligations at any time, and that H & H had notified its employees of this feature of the plan in accordance with the disclosure requirements of ERISA. Pet. App. A38. After H & H learned of McGann's illness, it decided to exercise its option to make changes in the benefits provided for the stated purpose of "preserving the financial integrity of the welfare plan." H & H Br. in Opp. App. 6a; Pet. App. A38.

Life Insurance Co. was first the insurer of H & H's plan and later the administrator of H & H's self-insured plan. McGann alleged that they conspired with H & H to violate Section 510 and that the respondents also violated various state laws. Respondents contended that the state law claims were preempted by ERISA, the district court dismissed those claims, and McGann did not appeal the dismissal. See Pet. App. A5 & n.22.

The affidavits included other evidence which, if true, would further support H & H's assertion that the changes in coverage were motivated by cost considerations. In the preceding years, the plan had suffered serious financial losses. Pet. App. A38. Premiums received from the employees in the prior 12-month period covered only two-thirds of the cost of the benefits paid. H & H Br. in Opp. App. 4a. Further, the changes in coverage were not limited to the imposition of a $5,000 cap on AIDS-related treatment. Among other things, the amount of the deductible was increased by 50%; employee contributions were increased by $17.50 per payday for family coverage; all treatment for drug and alcohol dependency was excluded; and a preferred provider program was adopted. *Id.* at 5a-6a.

McGann filed an affidavit in opposition to summary judgment. His affidavit stated that he submitted claims for treatment expenses in December 1987 or January 1988, and advised his manager in early 1988 that he had AIDS. H & H Br. in Opp. App. 22a. McGann further indicated that he was the only employee affected by the change in AIDS coverage, and that he had "no doubt that my medical condition and the prospects of my future utilization of my insurance for my medical condition was the prime motivator in [respondents'] change in my coverage." *Id.* at 23a. McGann did not adduce any other evidence that H & H had any animus against him, against persons with AIDS, or against persons who had exercised rights conferred by the benefit plan. McGann did not file an affidavit under the terms of Federal Rule of Civil Procedure 56(f) explaining why further discovery would be necessary to enable him to rebut respondents' evidence.

c. The district court granted summary judgment in favor of respondents, concluding that the undisputed facts established that respondents had not violated Section 510. Pet. App. A34-A43. The court first found that ERISA does not require employers to provide any particular bene-

fits, and does not prohibit employers from offering different types of coverage for different illnesses. *Id.* at A37. The court also noted that the summary plan description that H & H provided to employees pursuant to 29 U.S.C. 1022(a)(1) "included a paragraph clearly stating that the plan sponsor could terminate or amend the Plan or terminate any benefit under the Plan at any time." Pet. App. A39. The district court went on to reject McGann's discrimination claim because H & H "had the right to change or terminate the medical plan under ERISA" and "the action was not taken to interfere with the rights of McGann but to ensure the future existence of the plan." *Id.* at A41.

3. The court of appeals affirmed. Pet. App. A1-A33. It first stated that McGann had to demonstrate H & H's "specific intent" either (1) to retaliate against him for "filing claims for AIDS-related treatment" or (2) to interfere with his "attainment of any right to which he may have become entitled." *Id.* at A10. With respect to McGann's retaliation claim, the court held that McGann had failed to offer evidence that would support the inference that H & H acted with the intent to retaliate against him for filing benefit claims. To the contrary, the court concluded, the record showed that H & H's motive was to avoid paying for AIDS treatment "no more for McGann than for any other present or future plan beneficiary who might suffer from AIDS." *Id.* at A10-A11.

With respect to McGann's interference claim, the court held that McGann had failed to show that H & H interfered with a right to which he "may [have] become entitled" under the plan because the continued availability of a $1 million coverage limit was not such a right. "The right referred to in the second clause of section 510 is not simply any right to which an employee may conceivably become entitled," the court reasoned, "but rather any right to which an employee may become entitled pursuant to an existing, enforceable obligation assumed by the em-

ployer." Pet. App. A11-A12. Here, H & H specifically retained discretion to modify plan coverage at any time. *Id.* at A12-A13. To accept McGann's argument, the court stated, effectively would mean that an employer could not reserve the right to amend its plan. *Id.* at A13-A14.

The court of appeals found unpersuasive McGann's reliance on Section 510 cases involving wrongful discharge. Section 510 specifically prohibits a "discharge" undertaken "for the purpose of interfering with the attainment of any right." The cases cited by McGann were resolved under that portion of Section 510, and did not address the very different question of when an employer's amendment of the terms of a plan can be characterized as unlawful "discrimination." Pet. App. A16 & n.27.[2] In the court's view, the cases more relevant to this issue were those holding that ERISA gives an employer the right to amend its welfare benefit plans and does not require different groups of participants to be treated equally. *Id.* at A19-A26. The court concluded that "ERISA does not broadly prevent an employer from 'discriminating' in the creation, alteration or termination of employee benefit[] plans," and Section 510 "does not prohibit an employer from electing not to cover or continue to cover AIDS, while covering or continuing to cover other catastrophic illnesses, even though the employer's decision in this respect may stem from some 'prejudice' against AIDS or its victims generally." Pet. App. A29-A30. Such discrimination

[2] The court also distinguished *Vogel* v. *Independence Federal Savings Bank*, 728 F. Supp. 1210 (D. Md. 1990), the only case cited by McGann "in which a court has ruled that a change in the terms and conditions of an employee-benefit[] plan could constitute illegal discrimination under section 510." Pet. App. A16. In that case the employer changed insurers, and the new policy "covered all previously covered employees * * * with the exception of Leonard Vogel." 728 F. Supp. at 1216. The court noted that in this case, in contrast, "[t]he post-August 1, 1988 $5,000 AIDS coverage limit applies to any and all employees." Pet. App. A18.

is illegal under ERISA, the court stated, "only if it is motivated by a desire to retaliate against an employee or to deprive an employee of an existing right to which he may become entitled." *Id.* at A30-A31.

4. McGann died in June 1991, while the case was under submission to the court of appeals. Frank Greenberg, the executor of his estate, filed a petition for a writ of certiorari seeking review of the Fifth Circuit's judgment.

DISCUSSION

This case implicates health care policy issues of serious concern to the United States. McGann lost insurance coverage for the treatment of AIDS at the time it was needed most—when his medical condition effectively foreclosed the purchase of alternate insurance and treatment costs could exceed his means. Efforts are under way at the state and federal level to regulate health insurance plans in a manner that minimizes the potential for such personal hardship, while at the same time affording employers the flexibility needed to guard against unmanageable costs.

The issue here, however, is a narrow one—the meaning and scope of Section 510 of ERISA. In our view, the court of appeals correctly held that nothing in that provision prohibited H & H from adopting a plan amendment that disadvantaged persons with AIDS for the purpose of reducing plan costs. Any other interpretation cannot be reconciled with provisions of ERISA that more directly address the validity of the plan terms at issue here. Those provisions establish that Congress decided not to prohibit plan amendments reducing existing health care benefits, 29 U.S.C. 1051(1), 1054(g); not to "proscribe discrimination in the provision of employee benefits," *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983); and not to "regulate the substantive content of welfare-benefit plans." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 732 (1985).

The decision of the court of appeals does not conflict with the decision of any other court, and the gravamen of the complaint—fairness to persons who are sick or disabled—is a subject that has now been addressed by the Americans with Disabilities Act of 1990 (ADA). We accordingly do not believe that further review is warranted in this case.

1. a. This case essentially involves the enforceability of two terms in the H & H benefit plan: one which reserved the right to amend the plan to reduce or eliminate coverage at any time, and one which provided less favorable treatment to persons suffering from AIDS. In provisions governing the permissible content of employee benefit plans, set forth in Part Two of Subtitle B of Subchapter I of ERISA (Part Two), 29 U.S.C. 1051-1061 (1988 & Supp. II 1990), Congress directly identified certain plan terms that are required or prohibited. It is therefore significant, as the court of appeals concluded, that Part Two of ERISA would clearly permit an employer to include the two terms at issue in its employee health insurance plan.

The Court's decision in *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983), confirms that by declining to regulate the content of the terms of health plans, ERISA "does not itself proscribe discrimination in the provision of employee benefits," *id.* at 91. As a result, terms differentiating among diseases are permitted. The same is true with respect to terms reserving the right to amend a health care plan to reduce existing coverage at any time. Although Congress mandated that *pension benefits* must vest, 29 U.S.C. 1053(a) (1988 & Supp. II 1990), and restricted an employer's right to amend pension plans by altering the vesting schedule, 29 U.S.C. 1053(c) (1988 & Supp. II 1990), or decreasing accrued benefits, 29 U.S.C. 1054(g), Congress specifically provided that these limitations did not apply to *health benefit plans*, 29 U.S.C.

1051(1).[3] See *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 732 (1985) (observing that ERISA "imposes upon pension plans a variety of substantive requirements relating to participation * * * and vesting" but that it "does not regulate the substantive content of welfare-benefit plans").

Instead of regulating the content of self-insured employee health plans, ERISA adopted the rule that a participant's right to benefits are, by and large, those defined by the terms of the contract.[4] See 29 U.S.C. 1132(a)(1)(B) (participant may sue "to recover benefits due to him *under the terms of his plan*") (emphasis added). There is no claim in this case, however, that H & H did not pay benefits in accordance with the terms of the plan, or that the amendments were not adopted in conformance with the requirements of the plan.[5] Petitioner's right to recover benefits must accordingly turn on whether the plan amendments in issue, although facially legitimate under Part Two of ERISA, nevertheless violated Section 510, 29 U.S.C. 1140.

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[3] Congress has provided that plans must provide for the continuation of health coverage in certain circumstances. For example, a group health plan must provide that a terminated employee is eligible to continue to be covered for a period of time ranging from 18 months to 36 months. See 29 U.S.C. 1161(a), 1162(2) (1988 & Supp. II 1990), 1163(2). If coverage for employees is modified, continuation coverage is modified in the same manner. 29 U.S.C. 1162(1).

[4] States may mandate that *insured* health benefit plans provide certain benefits, however. *Metropolitan Life*, 471 U.S. at 739-747 (upholding a Massachusetts law requiring insurance companies to provide specified minimum mental health care benefits in any health insurance plan offered in the State). Such laws do not apply, however, to self-funded employer plans such as the one in issue here.

[5] The terms of some plans may permit amendments with a purely prospective impact only, and preclude plan amendments, such as the one in issue, which also eliminate continuing coverage for individuals with pre-existing conditions. Such issues of plan interpretation may be raised in a benefit claim action under Section 502(a)(1)(B) of ERISA, 29 U.S.C. 1132(a)(1)(B). No such claim was made here.

b. As this Court recognized in *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 485 (1990), Section 510 was "crucial" to the scheme of regulation adopted by Congress so that "employers would [not] be able to circumvent the provision of promised benefits." See also *Dister* v. *Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988) (stating that Section 510 "was designed primarily to prevent 'unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights,'" quoting *West* v. *Butler*, 621 F.2d 240, 245 (6th Cir. 1980)).[6] By way of example, an employer who is not entitled to amend a plan to prevent the imminent vesting of an employee's pension benefit under Part Two of ERISA, should not be able to circumvent that statutory requirement by terminating the employee.

Consistent with that purpose, Section 510 prohibits certain types of conduct—any action to "discharge, fine, suspend, expel, discipline, or discriminate against a participant"—inflicted for the specific purpose of interfering with rights protected by the plan or ERISA. Section 510 does not broadly prohibit all types of "discrimination" against participants. Like other similar laws, its limited terms make clear that Section 510 only prohibits discrimination undertaken for the purposes expressly made "impermissible" (see *Furnco Construction Corp.* v. *Waters*,

[6] In *Dister*, for example, the plaintiff alleged that he had been discharged four months before he would have qualified for early retirement, resulting in a loss to him of $550,000. 859 F.2d at 1115. Congress had specifically contemplated that Section 510 would bar discharges that were intended to prevent employees from vesting: Senator Hartke stated that "[t]he key to effective pension reform is early vesting, but a vesting provision is no better than the protection employees have against improper discharge—including layoff discipline or other discrimination that puts an employee out of a job before vesting is achieved, thereby defeating his pension claim." 1 Staff of Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 1244 (Comm. Print 1976); see also *id.* at 1641 (statement of Sen. Javits).

438 U.S. 567, 577 (1978)) by the terms of the statute. See, *e.g.*, *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (discrimination against aliens did not violate Title VII because it is not among the "kinds of discrimination the Act makes illegal").

The court of appeals was thus correct in its conclusion that the facially legitimate plan amendment at issue could only be unlawful under Section 510 if it was adopted for the purpose of retaliating against a participant "for exercising any right * * * under the * * * plan [or ERISA]" or "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or ERISA]." 29 U.S.C. 1140.[7] Inclusion of the discriminatory amendment for any other reason, whether due to racial or social animus, is simply not forbidden by the plain language of Section 510.

The correctness of the ruling below accordingly turns on whether there was sufficient proof in the record of the "kinds of discrimination," *Espinoza*, 414 U.S. at 95, prohibited by Section 510. We share the court of appeals' view that there was not.

2. a. Turning first to the retaliation clause of Section 510, we do not believe that the record created a genuine issue of fact on the question whether H & H amended the plan for the "impermissible" purpose of discriminating against McGann "for exercising any right to which

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[7] In our view, Section 510 is applicable to plan amendments made for purposes prohibited by that Section, and is not limited to protection of the overall employment relationship. But see, *e.g.*, *Deming* v. *American Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir. 1990). Thus, for example, plan amendments made in retaliation for filing a breach of fiduciary duty action should be unlawful. We also do not believe that there is any basis in the language of Section 510 for limiting the reach of the provision to employers. See Gen. Am. Br. in Opp. 15-19. The provision applies to "any person," not just employers. And some of the proscribed actions—such as fines and expulsion—appear to be aimed more at unions than employers.

he is entitled under the provisions of an employee benefit plan." As set forth, H & H submitted evidence that the amendment was made for the purpose of reducing plan costs. If true, no violation of Section 510 would have occurred because the terms of ERISA, and the plan in issue, did not prohibit H & H from reducing health benefits for the purpose of saving costs. That is, of course, the reason employers include plan provisions permitting the reduction of benefits—provisions which Congress chose not to prohibit.

In this case, McGann did not rebut the evidence submitted by H & H with any specific factual information suggesting that the amendment was instead motivated by animus towards McGann or other persons who exercised rights under the plan. Instead, petitioner's claim of impermissible discrimination on this record must rest on the view that a prohibited purpose can be inferred from the fact that the amendment had an adverse effect on a participant who had exercised rights under the plan by submitting claims, and/or from the fact that the plan amendment was undertaken with knowledge of, and in response to, McGann's submission of AIDS-related claims. We share the court of appeals' view that these two facts alone were not sufficient to establish a reasonable inference (in light of H & H's contrary evidence) that the plan amendments were made for the impermissible purpose of discriminating against persons who had exercised ERISA-protected rights.

(i) Evidence that an employer's conduct has an adverse impact on persons within a protected class certainly has relevance to issues of motive. But where an adverse effect on a protected group is quite likely to result from entirely permissible conduct, it is less reasonable to infer, based on that effect alone, that the challenged conduct was motivated by forbidden purposes. See, *e.g.*, *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 279 n.25 (1979) (holding that a preference for veterans that had the effect of

disadvantaging women did not rebut evidence of a non-discriminatory purpose because the adverse impact on the protected group was "essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate"). In the context of employee benefit plan administration, it is completely predictable that plan amendments eliminating or reducing certain types of benefits, and which are made for the legitimate purpose of saving costs, will often have a disproportionately adverse effect on persons who have submitted claims for that type of benefit under the terms of the plan. As the Court explained in *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 580 (1978), "we infer discriminatory animus" where "experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations," and evidence of discrimination must be evaluated "in light of common experience." *Id.* at 577. Because plan amendments motivated by permissible cost considerations will often adversely affect participants who have asserted rights under a plan, "common experience" dictates that evidence of such an effect on McGann was not alone sufficient to rebut H & H's evidence of permissible motives.

(ii) For similar reasons, the fact that submission of a claim for benefits has a causal connection with a subsequent reduction in coverage does not itself provide a sufficient basis for inferring impermissible discrimination against persons who exercise protected ERISA rights, at least on the facts of this case. An amendment designed to save money would normally (and reasonably) be based on experience under the plan, so that, for example, an amendment that decreases dental benefits should not be held unlawful because the amendment was prompted by expensive claims for dental benefits.[8] A holding that

[8] Such a decrease would not be materially different from the limitation at issue in *Tackitt* v. *Prudential Ins. Co.*, 758 F.2d 1572

a plaintiff like petitioner has a viable retaliation claim would mean, in effect, that health benefits vest—once a participant files a claim for some type of benefit, the benefit may not be decreased. But as we have described, Congress did not require plans to provide vested *health* benefits.

(iii) We do not suggest that a participant adversely affected by a discriminatory plan amendment would never be able to establish a reasonable inference that the amendment was made for impermissible purposes. For example, if a participant who files a breach of fiduciary duty action—a right protected by ERISA—is singled out for adverse treatment under a health plan amendment, there would be a strong inference that the amendment was made for an impermissible retaliatory purpose. That inference might well be strong enough to create a genuine issue of pretext even if the employer submitted evidence that the amendment was supported by cost considerations. As we view this case, however, what is missing is any cognizable argument that H & H's justification for its amendment was pretextual. As the court of appeals concluded, "there is nothing in the record to suggest that [respondents'] motivation was other than as they asserted, namely to avoid the expense of paying for AIDS treatment * * *, no more for McGann than for any other present or future plan beneficiary who might suffer from AIDS." Pet. App. A10-A11.

(11th Cir. 1985). In that case, the Office of Personnel Management (OPM) approved an amendment to a federal health care plan that limited home nursing payments to $2,500 per year. The reduction was designed, along with other changes, to avoid an increase in premiums. A retired federal employee who previously had been reimbursed for home nursing expenses of $80,000 per year challenged the amendment under the Administrative Procedure Act, alleging that OPM's decision to approve the benefit change was arbitrary and capricious. The court rejected the challenge.

b. Turning to the second kind of discrimination forbidden by ERISA, the record also did not establish that H & H reduced AIDS treatment "for the purpose of interfering" with McGann's "attainment of any right" to which he might have become "entitled" within the meaning of Section 510. As the court of appeals explained, the clause does not refer to "any right to which an employee may conceivably become entitled," but to "any right to which an employee may become entitled pursuant to an existing enforceable obligation assumed by the employer." Pet. App. A11-A12. On this record, it was appropriate for the court to conclude that H & H was simply exercising its own reserved right to amend its plan to reduce expenses, and did not thereby impermissibly interfere with any right protected under Section 510.

Petitioner's reading of Section 510 simply cannot be reconciled with the statute. Instead of preventing "circumvent[ion] * * * of * * * promised benefits," *Ingersoll-Rand*, 111 S. Ct. at 485, that reading of Section 510 would effectively create rights and benefits that were never promised by the employer and never mandated by Congress.

First, petitioner's construction would effectively prohibit any discrimination among types of illnesses, contrary to the Court's conclusion that "ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits." *Shaw*, 463 U.S. at 91. Consistent with the premise stated in *Shaw*, health benefit plans routinely discriminate among participants suffering from different types of illnesses. Many plans, for example, limit coverage for mental illness. Such discrimination has never been called into question under ERISA, by any court, or the Department of Labor, which administers the relevant provisions of the Act. Under petitioner's construction of Section 510, however, such pro-

visions would be unlawful because their purpose necessarily is to prevent persons with mental disorders from the "attainment of any right" to treatment under the terms of the plan. Section 510 cannot reasonably be read in that manner.

Second, petitioner's reading of Section 510 would also result in the vesting of health care benefits—a result Congress clearly chose not to mandate under Part Two of ERISA—because any plan amendment reducing existing coverage would necessarily interfere with the "attainment" of a participant's "right" to continue to make such claims in the future. It is therefore only reasonable to conclude that when the sponsor of a plan has reserved an absolute right to amend its plan, an employee has no "right" protected by this clause of Section 510 to prevent plan amendments made for the purpose of altering existing coverage to save costs.

As the Seventh Circuit explained in a case involving an amendment reducing benefits, "[t]o say that the * * * provision was eliminated in order to prevent the [employees] from obtaining the benefits of the * * * provision is a tautology which highlights the fact that this sort of allegation cannot support a § 510 claim." *Deeming* v. *American Standard, Inc.*, 905 F.2d 1124, 1127 (1990). Any other conclusion would effectively negate an employer's right to amend plans to decrease benefits, despite Congress's determination that such a right was important to the statutory scheme adopted. See *Moore* v. *Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988) ("[w]ith regard to an employer's right to change medical plans, Congress evidenced its recognition of the need for flexibility" due to "inflation, changes in medical practice and technology, and increases in the costs of treatment independent of inflation").

3. On balance, we are not persuaded that this case warrants review. Although the issue itself is important, no court of appeals has adopted a conflicting interpreta-

tion of Section 510. Accordingly, review is unnecessary at this time to ensure the uniformity of lower court decisions interpreting ERISA. We instead believe that the issues of health care policy implicated by this case are more appropriately addressed in the context of other existing federal law and pending legislative initiatives.

a. A fair reading of the complaint and affidavit submitted by McGann suggests that this case is really about discrimination against persons with AIDS, and not discrimination against persons exercising ERISA-protected rights. Since this case was litigated, however, the law has changed considerably. The legality of such discrimination under the terms of employee benefit plans will undoubtedly be tested in cases arising under the Americans with Disabilities Act of 1990 (ADA), which took effect for most employers in July of 1992. See Pub. L. No. 101-336, § 108, 104 Stat. 337 (1990) (42 U.S.C. 12111 note (Supp. II 1990)).

The ADA prohibits discrimination against disabled individuals with respect to compensation and "other terms, conditions, and privileges of employment." ADA § 102(a), 104 Stat. 331-332 (42 U.S.C. 12112(a) (Supp. II 1990)). Since the courts have held that AIDS is a protected handicap under the Rehabilitation Act of 1973, see, *e.g.*, *Severino* v. *North Fort Myers Fire Control Dist.*, 935 F.2d 1179, 1182 n.4 (11th Cir. 1991), and the ADA's definition of disability is substantially the same as the Rehabilitation Act's definition, see 29 U.S.C. 706(8)(B) (1988 & Supp. II 1990) and ADA § 3(2)(A), 104 Stat. 329-330 (42 U.S.C. 12102(2)(A) (Supp. II 1990)), persons with AIDS are protected by the ADA. See EEOC, *ADA Handbook*, at I-28 (1991). Accordingly, discrimination against persons with AIDS in the provision of employee benefits is unlawful under the ADA unless the challenged action is protected by the provision of the ADA allowing insurers and plan administrators to observe the terms of "a bona fide benefit plan" that is not "used as a

subterfuge" to evade the purposes of the ADA. ADA § 501(c), 104 Stat. 369-370 (42 U.S.C. 12201(c) (Supp. II 1990)).

Because Congress directly addressed the subject of AIDS discrimination in employee benefit plans under the ADA, claims such as that in issue will likely turn on the requirements imposed on employers under that law. The need for review in this case is therefore further diminished.

b. This case also raises an issue of health care policy beyond discrimination against AIDS—whether health insurance plan amendments reducing or eliminating coverage for a particular type of illness should be applicable to persons, like McGann, already suffering from that illness. In some cases an employee may be able to prevail in a benefit claim action under Section 502(a)(1)(B) of ERISA, 29 U.S.C. 1132(a)(1)(B), based upon a claim that, under the terms of the plan, the employer did not in fact reserve an unfettered right to amend the plan, but instead promised to pay all expenses resulting from a disease an employee contracts prior to the date of the amendment. But the scope of the promise made by an employer depends on the terms of the plan at issue and that question would be addressed in a benefit claim action under Section 502(a)(1)(B). No such question is presented in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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